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No. 99-1240

IN THE

Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

While there is much to lament about the way society historically has treated the disabled, there is nothing to lament about the way the Constitution permits government to respond to this complex and enduring social issue.

The Commerce Clause generally permits Congress to enact national employment and public-access standards regarding the disabled. And no aspect of the Constitution, whether the Tenth Amendment, the Eleventh Amendment or any other, bars Congress from making these national requirements generally applicable to most government employees and to most government services, if indeed not to all of them. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983). That means Congress may make every affirmative-accommodation requirement, every disparate-impact test, every public-access mandate, and every other standard established by the ADA applicable to most if not all state employees. And that means Congress may authorize federal-court actions against state officials to enforce these statutory standards, and may require non-complying States to fund the costs and fees of bringing such actions. *See Ex Parte Young*, 209 U.S. 123 (1908); *Hutto v. Finney*, 437 U.S. 678 (1978).

What the Constitution still prohibits Congress from doing, however, is using its Commerce Clause powers freely to abrogate "a fundamental" attribute of "sovereignty"—"the States' immunity from suit" in money-damages actions. *Alden v. Maine*, 119 S. Ct. 2240, 2246 (1999). Before Congress may give one state resident access to money a State democratically levies from all residents, the Fourteenth Amendment requires something more—either that the State's underlying conduct violates the Constitution or that the States have brought these extra-constitutional duties upon themselves by engaging in a pattern of unconstitutional conduct. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

At stake in this litigation then is not whether Congress may enact "national legislation comprehensively prohibiting discrimination on the basis of disability" in the private and public sectors. U.S. Br. 10. It may, and it has. That is why petitioners do not challenge Congress's authority to permit Ms. Garrett or Mr. Ash to file an action against state officials to obtain their original job back or to obtain a reasonable accommodation in their current one. *See* Pet'r Br. 21. What separates the parties is not compliance with a national standard, but whether claimants may obtain retroactive relief from a state treasury above and beyond that compliance.

Yet not one respondent or *amicus curiae* has argued that the absence of a federal money-damages action has ever created, perpetuated, or otherwise been responsible for, constitutional violations against the disabled. Every single claim of discrimination that has been identified concerns matters that have been, or may be, resolved by *Ex Parte Young* actions against appropriate state officials for prospective injunctive relief. Be they zoning requirements, hiring practices or barriers to public services, not one of these potential concerns requires passage of the ADA's abrogation provision —42 U.S.C. § 12202. The fact is, society's vital quest for equality, integration, and dignity of the disabled has never been about money damages. To the extent the disabled have ever asked for anything more than the government already provides all citizens, it has always been about the forward-looking objective of removing barriers to access, not the backward-looking objective of erecting special private-damages actions. Nor was this distinction lost on Congress. In contrast to its treatment of the States, Congress chose not to expose executive-branch agencies of the federal government or private parties to many of the individual money-damages actions that it now wishes to impose on the States.

Once this modest framing of the issue has been accepted, and no one has contended that it should not be, nothing in the

briefs of respondents or their *amici* should give the heart or mind pause in reversing the decision below.

1. **Rational-basis review governs claims of unconstitutional discrimination against the disabled.** In answering Alabama's opening brief, respondents do not claim that *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), or any of the other cases applying rational-basis review to classifications based on disability, *see Heller v. Doe*, 509 U.S. 312 (1993), *Schweiker v. Wilson*, 450 U.S. 221 (1981), should be overruled. The alleged problem that the ADA purports to correct then is one defined by familiar features of constitutional litigation. Not only does a "strong presumption of validity" accompany such classifications, *Heller*, 509 U.S. at 319 (quotation omitted), *see City of Cleburne*, 473 U.S. at 446, but to overcome the presumption, the claimant must "negative every conceivable basis which might support" the classification, *Heller*, 509 U.S. at 320, whether the justification turns on something as pragmatic as "budgetary constraints," *Schweiker*, 450 U.S. at 238-39, or whether it turns on after-the-fact "rational speculation unsupported by evidence or empirical data," *Heller*, 509 U.S. at 320 (quotation omitted).

2. **Alleged discrimination under the ADA is not governed by rational-basis review**. Given this "virtually unreviewable" standard of review, *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993), respondents understandably do not try to justify the ADA on core section 5 grounds—that the Act merely asks the states to do what equal protection already requires. They thus do not counter Alabama's contention (Pet'r Br. 29) that the ADA "'prohibits substantially more state . . . decisions and practices than would likely be held unconstitutional under the . . . rational basis standard.'" (Quoting *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 635 (2000) *Cf. W. Air Lines v. Criswell*, 472 U.S. 400, 421-22 (1985) (judicial scrutiny under the ADEA "is

inconsistent with" and "significantly different" from "rational basis" review).

3. **Congress did not identify a "widespread and persisting deprivation of constitutional rights."** *City of Boerne*, 521 U.S. at 526. That leaves the argument respondents have made—that the ADA represents a conditional exercise of Congress's power to command the states to do more than equal protection requires. In attempting to justify this assertion of power, one set of claimants argues (Resp't Br. 19) that "Congress made express findings that there was a pervasive problem of unconstitutional State and local government conduct," and the other claimant argues (U.S. Br. 8) that Congress found "a pervasive history of unconstitutional conduct by the States." These are serious charges, but in the end they do not hold.

The text of the law offers no support for this across-the-board indictment. While the statements of findings and purpose to be sure invoke the full "sweep of congressional authority," that shows only that Congress meant to do everything the Constitution permits it to do, not that it had established the necessary predicate for imposing these extra-constitutional duties on the States. And while the findings generally identify "discrimination against individuals with disabilities" as a "serious and pervasive social problem," 42 U.S.C. § 12101(a)(2), they do not find, much less establish, "that the State[s] had engaged in any *unconstitutional* [disability] discrimination." *Kimel*, 120 S. Ct. at 649 (emphasis added). Through nine extensive findings and four statements of purpose, the legislature never makes this essential point, never uses the word "unconstitutional," and never cites a single case or study to this effect. As the claimants acknowledge (Resp't Br. 18), the findings make "no distinction between public sector employment and private sector employment" in their claims of discrimination and "purposeful unequal

treatment" (42 U.S.C. § 12101(a)(7)), even though the Constitution limits one but not the other.

The Congress that enacted the ADA, like the one that passed the ADEA, never engaged in the debate that the Court is being asked to referee now—whether the States engaged in a pattern of unconstitutional conduct. As the statement of purpose attests, Congress responded to a "social problem," not a constitutional one; it established a "national mandate for the elimination of discrimination against individuals with disabilities," not for the elimination of unconstitutional conduct; and it ultimately "enforc[ed] the standards established in this chapter," not those of the Fourteenth Amendment. 42 U.S.C. §§ 12101(a)(2), (b)(1) & (3). That does not suffice.

4. **The legislative record fares no better in establishing any such pattern**. Just as the full Congress could not say that a form of state action that is "virtually unreviewable" under rational-basis review, *Beach Communications*, 508 U.S. at 316, had somehow generated a "widespread and persisting deprivation of constitutional rights," *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank.*, 119 S. Ct. 2199, 2210 (1999) (quotation omitted), neither could the committees, their staffs or the myriad interest groups that participated in the process identify any such pattern. Making this gap all the more conspicuous is the comprehensive nature of the legislative record, which as the federal government notes (U.S. Br. 6, 9) covered "40 years" "of legislative experience in the field, years of hearings and study, multitudinous submissions and testimonials by citizens across the Nation, and thoroughgoing congressional review." Yet, through it all, the record contains not one study or statement about constitutional violations.

Nor do the smattering of cases cited in the record support the exuberant claim (U.S. Br. 8) that there was "pervasive . . . unconstitutional conduct by the States." *City of Cleburne* is discussed not because it involved a constitutional violation by

a city government. It is mentioned only to criticize the standard of review the Court adopted there (and applied earlier in *Schweiker* and later in *Heller)*, and then to urge a more rigorous statutory standard in its place. *See* Pet'r Br. 37 (criticizing "consign[ment]" of cases "involving disability discrimination" to the standard that is the "least favorable to the individual") (citation omitted); *see also* Staff of the House Comm. on Educ. and Labor, *Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act*, 101st Cong., 2d Sess. 963 (1990) ("House Comm. on Educ. and Labor") ("I find that the fact my two children are not protected under the Constitution to be unacceptable to me. And it is unacceptable to me that 36 million disabled Americans are not protected under the Constitution. I think we need this legislation."). And while *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), also is mentioned, that case did not involve a constitutional claim but a statutory one. *See* Senate Comm. on Labor and Human Resources, S. Rep. 101-116, 101st Cong., 1st Sess. 7 (1989).

The other cases discussed in the legislative record, all lower-court decisions, do not involve constitutional violations at all. *See Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981) (Rehabilitation Act) (House Comm. on Educ. and Labor at 1617); *Heumann v. Bd. of Educ. of the City of New York*, 320 F. Supp. 623 (S.D.N.Y. 1970) (dismissing constitutional claim as moot because a *state* administrative appeal corrected the complaint) (House Comm. on Educ. and Labor at 1611); *State ex rel. Beattie v. Bd. of Educ. of the City of Antigo*, 172 N.W. 153 (Wis. 1919) (state law claim) (House Comm. on Educ. and Labor at 2242). These cases not only fail to show a track record of constitutional violations, but one of them even explains why. *See Pushkin*, 658 F.2d at 1384-85 ("mere fact that the University acted in a rational manner is no defense to an act of discrimination" under the Rehabilitation Act).

5. **Other portions of the legislative record fall well short of establishing state constitutional violations.** Having failed to identify anything in the text of the ADA or any cases cited in the legislative record establishing pervasive state misconduct, respondents fall back on "cobbl[ing] together" "isolated sentences clipped from floor debates and legislative reports" that purport to establish this pattern. *Kimel*, 120 S. Ct. at 649 (citation omitted). But, in doing so, they have no more success than the claimants did in *Kimel* or *City of Boerne*.

In some instances, the citation does not involve state action at all. *See, e.g.*, House Comm. on Educ. and Labor at 936 (U.S. Br. 29) (references to general discrimination by hotel and restaurant owners excluding persons with disabilities). In some instances, the problem had already been resolved. H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2 at 40 (1990) (U.S. Br. 31) (testifying about lack of accessibility to town hall, though ramp placed there a year earlier) ("H.R. Rep. No. 485"); ACIR, Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal 80 (April 1989) (Resp't Br. 33) (noting States have enacted laws regarding the removal of barriers in public buildings, and all States have statutes requiring new buildings to be accessible). In some instances, the citations refer to societal discrimination, not unconstitutional discrimination. *See, e.g.*, H.R. Rep. No. 485, Pt. 3 at 25 (U.S. Br. 36) ("These discriminatory policies and practices affect people with disabilities in every aspect of their lives"); House Comm. on Educ. and Labor at 1040 (U.S. Br. 15) ("several thousand documents submitted by citizens and organizations outlining discrimination and other barriers," involving "millions of Americans with disabilities" who are still "subject to massive discrimination"). In some instances, the citations involve requests for national uniformity and claims that the federal law will provide more protection than state laws. *See, e.g., id.* at 1272 (U.S. Br. 40) (ADA will show a national commitment to the disabled) (Rep. Owens); *id.* at 1506, 1508 (U.S. Br. 39)

(describing need for uniformity) (C. Brooks); H.R. Rep. No. 485, Pt.2 at 39 (U.S. Br. 39) (ADA will provide more protection than Massachusetts law); *Id.* at 19 (U.S. Br. 39) ("patchwork quilt" of federal law).

But in all instances, our review confirms, respondents' citations do not involve a finding of unconstitutional state conduct. Nor is there any way of knowing on this record whether such a showing could have been made with respect to these allegations. Yet such claims are "virtually unreviewable" and since the claimant must "negative every conceivable basis which might support" the governmental decision, it would turn customary rules of judicial review on their head to assume that these extra-judicial statements establish a pattern of unconstitutional activity. Much like the testimony in the ADEA record, the legislature here compiled statements of alleged discrimination that justify making the ADA generally applicable to state officials under the Commerce Clause, but did not compile a record that justifies making money-damages claims applicable to non-consenting States under section 5.

6. **Other cases identified by respondents do not establish a pattern of unconstitutional discrimination by States against the disabled.** Respondents next attempt to manufacture a legislative record of their own by citing case law that they (and not Congress) have uncovered. This, too, fails.

Most of the cases involve statutory, not constitutional, claims and for that reason alone are unhelpful. The following cases, for example, all arose under the Rehabilitation Act. *See Alexander v. Choate*, 469 U.S. 287 (1985); *Chalk v. U.S. Dist. Ct. Cent. Dist. of Cal.*, 840 F.2d 701 (9th Cir. 1988); *Halderman v. Pennhurst State Sch. & Hosp.*, 612 F.2d 84 (3d Cir. 1979); *Recanzone v. Washoe County Sch. Dist.*, 696 F. Supp. 1372 (D. Nev. 1988); *Doe v. Dolton Elementary Sch. Dist. No. 148*, 694 F. Supp. 440, 442 (N.D. Ill.1988); *Robertson v. Granite City Cmty. Sch. Dist. No. 9*, 684 F. Supp. 1002, 1006 (S.D. Ill. 1988); *Ray v. Sch. Dist. of Desoto*

County, 666 F. Supp. 1524, 1536 (M.D. Fla. 1987); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1986); *Garrity v. Gallen*, 522 F. Supp. 171 (D.N.H. 1981). *See also Bd. of Ed. v. Rowley*, 458 U.S. 176 (1982) (Education for all Handicapped Children Act); *Harrelson v. Elmore County*, 859 F. Supp. 1465 (M.D. Ala. 1994) (ADA); *Baxter v. City of Belleville*, 720 F. Supp. 720 (S.D. Ill. 1989) (Fair Housing Act); *see also Stump v. Sparkman*, 435 U.S. 349 (1978) (state judge immunity).

Some cases involve successful claims filed under state law in state court, which contradicts the suggestion that the ADA responds to a failure to resolve these issues at the local level. *See, e.g., Burris v. City of Phoenix*, 875 P.2d 1340 (Ariz. Ct. App. 1993) (cancer victim given job as firefighter); *Carney v. Carney*, 598 P.2d 36 (Cal. 1979) (child custody to handicapped parent); *Conn. Inst. for the Blind v. Conn. Comm'n on Human Rights & Opportunities*, 405 A.2d 618 (Conn. 1978) (no per se exclusion of visually handicapped from state jobs); *In re Marriage of R.R. and R.R.*, 575 S.W.2d 766 (Mo. Ct. App. 1978) (child custody to handicapped father); *Carroll v. Cobb*, 354 A.2d 355 (N.J. Super. Ct. 1976) (no per se exclusion of mentally retarded from right to vote); *Boyd v. Bd. of Registrars of Voters*, 334 N.E.2d 629, 632 (Mass. 1975) (same).

Other cases involve successful constitutional claims against the federal government, which are equally unhelpful. *See LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987) (eighth amendment/federal prison); *Smith v. Fletcher*, 393 F. Supp. 1366, 1368 (S.D. Tex. 1975) (fourteenth amendment/NASA employee), *aff'd as modified*, 559 F.2d 1014 (5th Cir. 1977); *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (due process/education for handicapped children).

While still other cases involve constitutional violations by state and local governments, they by no means support respondents' claim (U.S. Br. 8) of "pervasive unconstitutional conduct by the States." Only two of these cases, it bears

emphasis, involve employment. Yet both challenge the actions of cities (not States), both turn on due process failings that cannot fairly be said to be remedied by the ADA, and one was not even necessary to the result. *See Gurmankin v. Costanzo*, 556 F.2d 184, 187 (3d Cir. 1977) (due process bars application of rule that blind teacher cannot take entrance examination because "she had an expectation, based on state law, of being admitted to the qualifying examination"); *Bevan v. N.Y. Teachers' Ret. Sys.*, 345 N.Y.S.2d 921 (Albany Cty. 1973) (city violated state law and due process by forcing retirement of blind teacher without a hearing). The ADA does not supply due process protections for state rights already in existence but instead is designed to create new federal rights in the first instance. And if the Eleventh Amendment does not extend to cities, *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280 (1977), it remains to be seen how States can be held responsible for constitutional violations by these presumptively-separate entities.

The remaining cases, all outside of the employment context, suffer from these failings and more. Like *Bevan*, other cases involve disputes in which the court ruled on constitutional and statutory grounds, making the constitutional ruling unnecessary to the result. *See N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 466 F. Supp. 487, 497 (E.D.N.Y. 1979) (state law, Rehabilitation Act, Education of Handicapped Act, consent decree and Fourteenth Amendment/segregation of hepatitis B children); *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1978) (eighth amendment and Rehabilitation Act/minimally adequate habilitation); *In re Adoption of Richardson*, 59 Cal. Rptr. 323 (Ct. App. 1967) (state law and equal protection/adoption by deaf and mute parents). One case, likewise, just involves a consent decree, which involves no constitutional finding at all. *See Pa. Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972) (state law and fourteenth amendment/state education of mentally retarded children).

The other cases involve procedures States must follow before they may commit an individual to an institution, concern the basic necessities of institutional care, and in one instance concern the appropriate education a State must provide to the disabled. *See Youngberg v. Romeo*, 457 U.S. 307 (1982) (substantive due process/ right to safe conditions of confinement and freedom from unreasonable restraints); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (due process/confinement of non-dangerous mentally-ill patient); *Thomas S. v. Flaherty*, 699 F. Supp. 1178 (W.D.N.C. 1988) (due process/habilitation, unreasonable restraint and safe conditions); *Manhattan State Citizens' Group, Inc. v. Bass*, 524 F. Supp. 1270 (S.D.N.Y. 1981) (state constitution, due process/right to vote of involuntarily committed patients); *Panitch v. Wisconsin*, 444 F. Supp. 320, 322 (E.D. Wis. 1977) (equal protection/appropriate education for handicapped children); *N.Y. State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973) (eighth amendment/safe conditions and medical care at institution for mentally retarded); *Wyatt v. Stickney*, 344 F. Supp. 387, 390 (M.D. Ala. 1972) (substantive due process/habilitation). But these cases, many of which established new constitutional doctrines at the time, cannot fairly be said to supply the necessary predicate for the disparate-impact and affirmative-accommodation provisions of Title I in employment and Title II in other public services. Not only is there the most tenuous of connections between these cases and the ADA (none, indeed, was mentioned in the legislative record), but two federal laws were already on the books by 1990 that specifically regulated these areas, the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq.* and the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.*

The same is true of the Eighth Amendment violations. *See Parrish v. Johnson*, 800 F.2d 600 (6th Cir. 1986) (deliberate indifference to paraplegic prisoner); *Leach v. Shelby County*

Sheriff, 891 F.2d 1241 (6th Cir. 1989) (same). While the ADA may cover state prisons, *see Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), nothing in it is designed to remediate Eighth Amendment violations against the disabled or for that matter any of the other constitutional violations committed against other prisoners. The two zoning cases (like most of these citations) again involve cities, and are of little utility for additional reasons as well. One applies heightened scrutiny rather than rational-basis review. *See J.W. v. City of Tacoma*, 720 F.2d 1126, 1129-30 (9th Cir. 1983) (applying "special judicial attention" to permit request for home for the mentally ill). The other involves discrimination against the disabled *and* the elderly, making it no more useful here than it was in *Kimel*. *See Burstyn v. City of Miami Beach*, 663 F. Supp. 528 (S.D. Fla. 1987) (application of zoning ordinance to home for elderly or handicapped violated equal protection).

But even if all of this were not the case, even if respondents (or Congress) had identified some isolated constitutional violations by a handful of States, that is "insufficient to support Congress' [extension of the ADA] to every State of the Union" and to do so with respect to every term and condition of state employment as well as every government service and building. *Kimel*, 120 S. Ct. at 649. In the final analysis, as respondents' carefully-worded arguments ultimately attest, they are claiming not a record of unconstitutional discrimination but of "discrimination" in general. That contention failed in *Kimel*, *Florida Prepaid*, and *City of Boerne*. It should fail here.

7. **The eugenics movement undermines rather than advances respondents' claims.** Respondents also rely on dispiriting laws from the early twentieth century that the gravitational forces of representative government cured long before Congress enacted the ADA in 1990. Doubtless, the eugenics movement, Social Darwinism and other claimed advances of the past prove the ease with which time can make yesterday's progressives look like today's reactionaries. And

these episodes may well prove that when Justice Holmes "erred," the "lucidity of his reasoning" showed that his explanation was "'wrong clearly,'" *Fulton Corp. v. Faulker*, 516 U.S. 325, 345 (1996) (quoting Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958)). *See Buck v. Bell*, 274 U.S. 200 (1927); *cf. City of Cleburne*, 473 U.S. at 461-62 (Marshall, J., concurring in part and dissenting in part) (discussing "grotesque" eugenics movement). Yet in this instance the legislative process validated the central premise of rational-basis review—the "Constitution['s presumption] that . . . even improvident decisions will eventually be rectified by the democratic process," *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (footnote omitted). When state democracies force compassionless laws into desuetude and later into repeal, and do so after withstanding judicial review no less, *see Buck v. Bell*, only a most paradoxical interpretation of the Enforcement Clause would allow Congress to come in after the hard work has already been done in order to correct what has long since been corrected.

That is not to say that the States have eliminated all restraints on the mentally disabled. As respondents note, many laws continue to place competency restrictions on the right to vote, marry and procreate. But these regulations turn not on furthering harsh Darwinian objectives, but on recognizing that a basic level of competency is required before anyone can meaningfully exercise these rights. Just as those of competent mind may make these decisions in whatever way they wish, so a civilized legal system requires that guardians of the incompetent be permitted occasionally to make some of these decisions in their place. *See, e.g., In re Grady*, 426 A.2d 467, 480-81 (N.J. 1981) ("Lee Ann Grady has the same constitutional right of privacy as anyone else to choose whether or not to undergo sterilization. Unfortunately, she lacks the ability to make that choice for herself. . . [H]aving the choice made in her behalf produces a more just and compassionate

result than leaving Lee Ann with no way of exercising a constitutional right."); Cal. Prob. Code § 1950 (same). While these laws certainly "discriminate" in the sense of treating the incompetent differently from others, no one can tenably argue that they violate the Constitution.

Far from identifying a record of incorrigible state activity, respondents in the end have not identified any pattern of state constitutional violations involving public employment or public access. The most they have done is to identify alleged instances of societal discrimination and controversial state practices that the "democratic process" long ago eliminated. Yet that history hardly supplies the necessary predicate for imposing these extra-constitutional requirements on the States. Section 5 after all corrects political dysfunction, not political virtue, and if there is dysfunction here it relates to a failure to appreciate that "[c]ongressional action under the Enforcement Clause of the Fourteenth Amendment" does have and should have "very significant consequences." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 35 (1981) (White, J., joined by Brennan, Marshall, JJ., dissenting in part) (citation omitted); *see id.* at 16. Neither States, their residents nor Congress have anything to gain from compromising this inquiry. If the core goal of section 5 is to root out Fourteenth Amendment violations, a casual inquiry into whether such violations exist will ultimately disserve rather than advance that essential end. What the Court said about the ADEA in *Kimel* remains pertinent in this instance: "Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field." 120 S. Ct. at 650.

8. **Congress did not identify any risk of *future* unconstitutional discrimination**. As Alabama showed in its opening brief (Pet'r Br. 37-38), the panoply of state and federal options available today to remediate or prevent a constitutional

violation make the possibility of such acts going unremedied exceedingly remote. Respondents nowhere claim that Congress felt differently about the matter. In point of fact, neither the text of the ADA nor the legislative record contains any such finding.

All respondents have done instead is attack the coverage of the pertinent state laws. In tandem, the federal government says (U.S. Br. 32) that Alabama "grossly exaggerates the coverage of those laws," while the private respondents say (Resp't Br. 36) the description of the state laws is "grossly inaccurate." On what basis this harmonized claim rests, however, remains unclear. No one has rebutted these truths: Before 1990, all 50 States prevented discrimination against the disabled under their own laws or administrative regulations, all 50 States provided some form of monetary remedy for such discrimination against the sovereign, all 50 States had policies advancing the hiring of persons with disabilities, and all 50 States had extensive other measures designed proactively to accommodate the needs of the disabled. *See* Pet'r Br. Appendix.

The apparent source of the "grossly inaccurate" claim, which respondents themselves never explain, appears to be an *amici curiae* brief filed by the National Association of Protection & Advocacy Systems, *et al.* That brief, however, makes no effort to rebut this essential point: A 50-State body of statutory law that goes well beyond what the Constitution requires, and indeed in 1990 was "so far out in front of the federal government, it's not funny," Pet'r Br. 4 (quoting Rep. Moakley), makes implausible the claim that a broad prophylactic law is needed to deter future constitutional violations. Rather than address this critical issue, the *amici* brief makes the unremarkable observation that the ADA places more stringent requirements on the States than some state laws do. That, however, is to be expected when 51 different sovereigns and 51 different legislative bodies tackle a complex

social problem. A cognizable risk of constitutional violations does not arise when some States provide less stringent statutory protections than a federal statute does.

Neither does such a risk arise simply because some States offer few monetary remedies or, like Alabama, do so only in the form of back pay available to some state employees in an administrative proceeding. The same, it turns out, can be said of the federal government. When it comes to the types of public-access requirements covered by Title II, the federal government provides no money-damages remedy at all. *See Lane v. Pena*, 518 U.S. 187 (1996). Surely, if the Constitution permits "Congress [to] believe[ ] it had greater direct authority over federal programs, through the use of its appropriations and oversight power, and thus less need of additional enforcement through private damages actions," U.S. Br. 4 n.1, it permits Alabama to embrace the same policy for its programs.

All of this is not to say, as respondents and their *amici* seem to suggest (*e.g.*, Resp't Br. 36) that the States claim to have cornered the market on legislative expertise in this area, or claim that the existence of these state laws precludes the necessity of enacting a federal standard under the Commerce Clause or the spending power. Respondents and their *amici* know better. Before Congress may place all 50 States in the section 5 dock, *City of Boerne* and its progeny require a problem of national import and of constitutional dimension. Yet the existence of these state laws, together with the minimal strictures of rational basis review and the absence of any pertinent track record of unconstitutional activity, show that the risk that unconstitutional acts will go unremedied has long been remote and by 1990 was virtually non-existent. As *Kimel* acknowledged, "State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union." 120 S. Ct. at 650 (footnote omitted). The same is true here.

9. **The ADA is not proportional and congruent section 5 legislation.** It is difficult to maintain, as the federal government does (U.S. Br. 43), both that the ADA was properly "modeled" on Title VII and that it represents a proportionate exercise of the Enforcement Clause. Title VII bars classifications that are presumptively unconstitutional, while the ADA bars classifications that are presumptively constitutional. Disability and "[a]ge classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'" *Kimel*, 120 S. Ct. at 645 (quoting *City of Cleburne*, 473 U.S. at 440). And disability, like age and unlike race or gender, "does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it." *Id.* Much as the ADEA improperly "elevated the standard for analyzing age discrimination to heightened scrutiny," *id.* at 648, the ADA impermissibly does the same.

It also is difficult to maintain both that the ADA's money-damages remedies are proportional in nature and that the federal government need not impose them on itself or on private parties in the same way. Yet that exactly describes the current legislative landscape. When the States violate Title II of the ADA, they expose themselves to retroactive money-damages actions, sometimes of great magnitude, *see* Brief *Amici Curiae* of Hawaii, et al. at 18-27, while neither the federal government nor private businesses face any such consequence under the ADA or any comparable statute. In the aftermath of the United States' concession of "less need of additional enforcement through private damages actions" against the federal government in this context (*id.*), and in the absence of any explanation why "private damages actions" have ever been needed to remedy or deter the allegedly unconstitutional conduct targeted by this provision, it would seem that this gap in the legislative record by itself suffices to

defeat the abrogation provision. While as a matter of policy Congress may well wish to lead by direction rather than example, it cannot be the case that a national effort to root out "massive, society-wide discrimination" (U.S. Br. 16 (quoting S. Rep. No. 101-116, at 8-9 (1989)) may tenably be deemed a proportionate response when the attempt to remedy that problem inexplicably commands far more of the States than of the National Sovereign.

In an understandable effort to distance the ADA from the ADEA, the United States also claims (U.S. Br. 41) that "the gap between what the Constitution and this legislation proscribes is far narrower than it was in *Kimel*." This point is never developed, and it remains unclear how it could be. Both forms of discrimination, contrary to respondents' contention (Resp't Br. 30-31), deal with precisely the same imperfect generalizations—that "physical and mental capacity sometimes diminish with age," *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991), and that handicaps sometimes diminish "physical and mental capacity." Not only do age and disability discrimination thus receive the same level of constitutional scrutiny but the ADA also contains additional disparate-impact and affirmative-accommodation requirements that the ADEA does not. Any "gap" between the statutory and constitutional tests is far broader here than it was in *Kimel*.

Nor do respondents offer any explanation why the ADA's disparate-impact and affirmative-accommodation requirements are proportionate efforts to identify and correct constitutional violations. Neither test is required under any level of constitutional review, even heightened scrutiny. And the cases on which the United States relies (U.S. Br. 43 n.53) to sustain this type of test all involve race discrimination. No doubt "[d]ifficult and intractable problems often require powerful remedies." *Kimel*, 120 S. Ct. at 636, 648. But that is true of difficult and intractable "constitutional" problems, such as race and gender discrimination where the stringent bar against

considering these factors justifies the need to "police" (Resp. Br. 43) what by definition are likely to be underlying constitutional violations. That is not true of disability discrimination, where the Constitution presumptively allows government to consider the physical and mental acuity of its citizens and where no "substantial risk of violating the Constitution" (U.S. Br. 7) accordingly exists. Here, in other words, the ADA polices government decisions that are exceedingly likely to be constitutional, making these types of requirements even less proportional than the more-modest disparate-treatment requirements in the ADEA.

All of respondents' other explanations for imposing these different burdens of proof and different standards of liability on the States operate at such a high level of generality that they would sweep away any meaningful limit on the section 5 power. Above all else, respondents never explain how the wide range of practices that the ADA proscribes could not conceivably be based on some rational policy or budgetary basis, which is all that the Constitution requires. The Act plainly bars "substantially more state . . . practices than would likely be held unconstitutional." *Kimel*, 120 S. Ct. at 635.

10. **The exercise of a prophylactic section 5 power in the setting of rational-basis review has not been justified here or in any other comparable setting**. The United States draws no dispute from us when it claims that "Congress's enforcement power . . . extends to the full spectrum of conduct that violates the Equal Protection Clause, and not merely to the class of governmental actions that this Court stands ready to invalidate under heightened scrutiny." U.S. Br. 39 Plainly, section 5 empowers Congress to create remedies for *all* constitutional violations covered by section 1 of the Fourteenth Amendment. But that is not what the ADA does. Instead, it claims to be requiring obedience to a constitutional guarantee by passing a law that has meaning only as applied to States that have obeyed the requirement. The statute does not create a

remedy, but a new standard. And an interpretation of the Enforcement Clause that permits prophylaxis in this setting, or is any other involving the "virtually unreviewable" requirements of rational-basis review, countenances not a power to "enforce a constitutional right," but a power to "chang[e] what the right is." *City of Boerne*, 521 U.S. at 519.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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